

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION**

KIRSTEN GREENAWAY,)	
)	
Appellant,)	D.C. Crim App. No. 2004-137
)	Super. Ct. Crim. No. F176/2000
)	
v.)	
)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
)	
Appellee.)	
)	

On Appeal from the Superior Court of Court of the Virgin Islands

**Considered: December, 2005
Filed: September 7, 2007**

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **CURTIS V. GOMEZ**, Judge of the District Court of the Virgin Islands; and **EDGAR ROSS**, Judge of the Superior Court of the Virgin Islands, Sitting by Designation.¹

ATTORNEYS:
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 For the Appellant,

Maureen Phelan, AAG
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 For the Appellee.

MEMORANDUM OPINION

In June, 2001, Kirsten Greenaway pled guilty to second-degree murder and was sentenced to twenty years in prison. On appeal, Greenaway asserts that the trial court violated her Due

¹ While Judge Ross participated in the panel discussion, he did not participate in the decision after his retirement.

Process rights by imposing a severe sentence without considering her particular situation. Greenaway also contends that her sentence violates the Eighth Amendment prohibition against cruel and unusual punishment. For the reasons set forth below, the Court finds that it lacks jurisdiction to hear Greenaway's Due Process claim and that Greenaway's sentence does not violate the Eighth amendment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of November 4, 1999, Duvlaier Basquin was robbed and killed in St. Thomas, Virgin Islands.²

During the subsequent investigation into Basquin's death, four suspects were questioned by the police: Selvin Hodge, Eladio Camacho, Ottice Bryan, and Kirsten Greenaway. Hodge gave a statement to the police, claiming that "Basquin was lured out to a remote place, then robbed and murdered." *Gov't of the V.I. v. Bryan*, 334 F. Supp. 2d 822, 823 (D.V.I. App. Div. 2001).

On May 2, 2000, a seven count Information was filed in the Superior Court of the Virgin Islands charging Greenaway, Hodge, Bryan, and Camacho with murder and conspiracy to commit murder.

On April 13, 2004, during a conference held prior to jury selection, Camacho agreed to testify against Greenaway, Hodge,

² A full account of the events on November 4, 1999 are found in this Court's earlier opinion regarding Selvin Hodge's motion to suppress. *Gov't of the V.I. v. Bryan*, 334 F. Supp. 2d 822, 823-4 (D.V.I. App. Div. 2001).

and Bryan and pled guilty to involuntary manslaughter.³ After the Superior Court accepted Camacho's plea, Greenaway pled guilty to second-degree murder. At the sentencing hearing on June 9, 2004, Greenaway was sentenced to twenty years in prison. This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review a conviction based on a guilty plea, but only to the extent that it raises a colorable constitutional claim. See See Revised Organic Act of 1954 23A, 48 U.S.C. § 1613a;⁴ V.I. Code Ann. tit. 4 § 33 (2002); see also *Elmour v. Gov't of the V.I.*, 2005 U.S. Dist. LEXIS 14071, at *5 (D.V.I. App. Div. June 24, 2005) (holding that despite a statutory limitation on appellate review of a guilty plea, the court must review such an appeal where constitutional claims are implicated (citing *Virgin Islands v. Warner*, 48 F.3d 688, 691 (3d Cir. 1995))). "To the extent a challenge to a guilty plea is based on constitutionally protected rights, our review is plenary." *Id.*

³ In September, 2001, the Superior Court redacted portions of Hodge's and Camacho's statements, a decision which this Court vacated in a December 17, 2001, order remanding the case to the Superior Court. The Third Circuit upheld this Court's decision in an opinion dated February 26, 2004.

⁴ The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2000), reprinted in V.I. Code Ann. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2003) (preceding V.I. Code Ann. tit. 1).

III. ANALYSIS

A. Sentencing Disparities

Greenaway contends that the gross disparity between her twenty-year sentence and Camacho's five-year sentence violates the Due Process clause of the Fourteenth Amendment.⁵

"Disparities in sentences among co-defendants are generally not reviewable" *United States v. Perez*, 904 F.2d 142, 147 (2d Cir. 1990). Indeed, "absent extraordinary circumstances, a defendant has no constitutional or otherwise fundamental interest in whether a sentence reflects his or her relative culpability with respect to his or her co-defendants." *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995); see also *United States v. Simpson*, 337 F.3d 905, 909 (7th Cir. 2003) (noting that a court will only "disturb a sentence based on an unjustifiable disparity between the length of the defendant's sentence and all other sentences imposed nationwide").

No such extraordinary circumstances exist in the case at bar. Camacho received a lighter sentence than Greenaway because

⁵ The Fourteenth Amendment states, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1. The Fourteenth amendment is applicable to the Virgin Islands though section 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1651.

he pled guilty to a lesser charge in exchange for testimony against his co-defendants.⁶ The United States Court of Appeals for the Third Circuit has held that sentencing disparities are not reviewable for "co-defendants where shorter sentences are the result of plea bargaining or government assistance." *United States v. Yeaman*, 248 F.3d 223, 230 (3d Cir. 2001).

B. Mitigating Factors

Greenaway next argues that the trial court violated her Due Process rights by ignoring mitigating factors before imposing sentence. In resolving this claim, "our first task is to determine whether we have jurisdiction to entertain this appeal from a sentence imposed from a guilty plea." *Karpouzis v. Virgin Islands*, 58 F. Supp. 2d 635, 637 (D.V.I. App. Div. 1998). The

⁶ At the sentencing hearing, government counsel stated:

In accordance with the agreement that was entered into with these Defendants at the time the plea was taken, Judge, as to the Defendant Camacho, as you know, the Government has entered into an agreement with him to induce him to be a witness on behalf of the Government and against the other Defendants, and as a result of that agreement, Mr. Camacho was allowed to plead to a lesser included charge.

At the time of sentencing, Judge, the Government indicated that we would ask for this Defendant to be sentenced to the maximum time . . . of five years. I think that would be adequate, Judge, in this particular case.

(J.A. 302-303.) While handing down Camacho's five-year sentence, the Court stated:

The Government has made a deal with each of you . . . it is the Government's option to make -- to bring cases, to dismiss cases, and they made a deal with the Defendant Camacho to plead to involuntary manslaughter, and Mr. Camacho, the Government has given you a deal. This Court cannot improve on it. . . .[I]t's going to be the sentence of this Court that you [Camacho] be incarcerated for a period of five years and be assessed \$75.00 in court costs.

(J.A. 323-324.)

Third Circuit Court of Appeals has ruled that the Appellate Court has jurisdiction to review a conviction based on a guilty plea only when the appellant raises a colorable constitutional claim. *Warner*, 48 F.3d at 691.

This Court considered this threshold issue in *Chick v. Government of the Virgin Islands*, 941 F. Supp. 49 (D.V.I. App. Div. 1996). The Court concluded that it lacked jurisdiction to consider the defendant's claim because the trial judge had considered the mitigating circumstances set forth in the pre-sentence report and imposed a sentence that was "far less than the allowable statutory maximum." *Id.* at 51.

Similarly, the record below indicates that the trial judge in this case considered all the mitigating evidence presented by Greenaway. The Superior Court specifically considered that Greenaway had received many positive recommendations and that she had attempted to improve herself since her arrest by studying for

a nursing career.⁷ The Superior Court also noted that Greenaway had not actually robbed and stabbed Basquin. After taking these factors into consideration, the Superior Court sentenced Greenaway to twenty years, far less than the allowable maximum of any term of years other than life imprisonment. *Cf. Gov't of the V.I. v. Berry*, 631 F.2d 214, 218 (3d Cir. 1980) (holding that though the Virgin Islands legislature set no maximum sentence for second-degree murder, "there is an upper limit in the sense that a sentence for second-degree murder . . . must be for a term of years"). As the Superior Court considered the mitigating

⁷ In remarks to the trial judge before sentencing, Greenaway's counsel urged the trial judge to consider that Greenaway was a committed nurse who tried to advance her skills by completing a nursing program, that she was not present when the confrontation between Basquin and the other defendants took place, and that she has no criminal record.

While handing down Greenaway's sentence, the Court stated in pertinent part:

The Court finds that each and every one . . . [was] involved in the planning of it. Miss Greenaway took the cab. She was driven to the Market Square. All of you knew what she was going there for. She took the cab to Bolongo. It was a long ride and she could have thought about it and asked the cab to stop anywhere short of that spot and save and avoided any of this.

At the very end, Mr. Basquin - he grabbed on to Mr Hodge and Mr. Hodge let him go and his hand was full of blood. They all left to run and left Mr. Basquin there to bleed to death in the cold night. No one even stopped on the way to make a phone call anonymously to 911 so that someone could go and help Mr. Basquin. He stayed there until the next day until someone found him dead. . . .

Ms. Greenaway, the Court, again, has received a lot of correspondence on your behalf. You tried to improve yourself by a nursing career, and the Court has taken all of that into consideration.

It's going to be the sentence of this Court that you will be incarcerated for a period of 20 years. . . .

Mr. Bryan and Mr. Hodge, you were the ones who actually performed the act, and it is going to be the sentence of this Court that you both be incarcerated for a period of 30 years.

evidence provided by Greenaway, this Court lacks jurisdiction to review her sentence.

C. Eighth Amendment Challenge

Greenway next argues that her twenty-year sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.⁸

When evaluating challenges under the Eighth Amendment, courts must consider three factors:

(1) The gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdictions; and (3) the sentences imposed for commission of the same crime in other jurisdictions.

United States v. MacEwan, 445 F.3d 237, 247 (3d Cir. 2006) (citing *Solem v. Helm*, 463 U.S. 277, 290-292 (1983)).

"[I]f the defendant fails to show a gross imbalance between the crime and the sentence our analysis is at an end." *MacEwan*, 445 F.3d at 248. Factors to be considered in making this assessment include: (1) whether the sentence is a life sentence or for a term of years, *MacEwan*, 445 F.3d at 247-252; (2) whether

⁸ The Eighth Amendment to the United States Constitution states:

"Excessive bail should not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONST. amend. VIII. The Eighth Amendment of the United States Constitution is applicable to the Virgin Islands through section 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1651.

the crime is a passive felony, *Id.*⁹; and (3) whether the sentence falls within outer bounds proscribed by the legislature. *Hunt v. Gov't of the V.I.*, 2005 U.S. Dist. LEXIS 4164, at *13 (D.V.I. App. Div. Mar. 14, 2005) ("In light of the deference to be accorded the legislature's determination of appropriate penalties, a sentence within the terms proscribed by the legislature will not be disturbed absent a showing of improper procedure, illegality or abuse of discretion."). *See generally Harmelin v. Michigan*, 501 U.S. 957, 1011 (1991) (Kennedy, J., concurrence) (identifying the primacy of legislature in determining appropriate punishment as one of the "common law" principles of the proportionality review).

In this case, Greenaway pled guilty to second-degree murder and could have been sentenced to any term of years other than life imprisonment. *Berry*, 631 F.2d at 218. Accordingly, her twenty-year sentence falls within the terms allowed by the legislature. *Hunt*, 2005 U.S. Dist. LEXIS 4164, at *13. Greenaway's twenty-year sentence is also for a terms of years, not a life sentence. *MacEwan*, 445 F.3d at 247-253. Finally,

⁹ The *MacEwan* Court observed that:

It was only in *Solem* that the [Supreme] Court ruled that a life sentence for a recidivist offender violated the proportionality principles of the Eighth Amendment. [*Solem*,] 463 U.S. at 296-297. There, the defendant - who had been convicted of uttering a "no account" check for \$100, which is a felony, and had six previous minor and non-violent felonies on his record - was appealing a life sentence without the possibility of parole. *Id.*

MacEwan, 445 F.3d at 248.

Greenaway's crime of second-degree murder is not a passive felony. *Cf. Solem*, 463 U.S. at 296-297.

Accordingly, we conclude that a twenty-year sentence for second-degree murder under 14 V.I.C. section 923(b) does not violate the Eighth Amendment ban against cruel and unusual punishment.

IV. CONCLUSION

For the foregoing reasons, we will affirm the judgment and sentence of the Superior Court. An appropriate judgment follows.

ENTERED September 7, 2007.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By: S_____
Deputy Clerk

Copies (with accompanying Judgment) to:

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